FILED

SUPREME COURT OF THE UNITED STATES CLERK

OCTOBER TERM, 1981

T. H. BELL, SECRETARY OF EDUCATION,

Petitioner,

v.

STATE OF NEW JERSEY,

T. H. BELL, SECRETARY OF EDUCATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA

PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATE OF WEST VIRGINIA, AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

NO. _____

IN THE
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COMMONWEALTH OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATE OF WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

The State of West Virginia urges this Court to grant the Petition for Certiorari herein, and affirm the decision of the Third Circuit on the merits. West Virginia is within the geographical jurisdiction of the United States Court of Appeals for the Fourth Circuit, which court has determined that the United States Department of Education has authority to order the State of West Virginia to reimburse $125,000.00 of a 1975 Title I grant. State of West Virginia v. Secretary of Education, 667 F.2d 417 (4th Cir. 1981) (App. A, infra, 1a-10a). This decision, like the decision of the Third Circuit complained of by the Secretary of Education in his petition, reviewed the authority of the Agency to recover Federal funds distributed to the states which are determined by Agency audits to have been misapplied under the terms of Title I of the

Elementary and Secondary Education Act of 1965* and its implementing rules and regulations.

In 1978, Congress enacted a statute specifically authorizing the Agency to "require the repayment of Federal funds which were misspent or misapplied." 20 U.S.C. § 2835(b). But the determinations complained of by New Jersey, Pennsylvania, and West Virginia all occurred prior to the effective date of said statute. The Third Circuit held that without specific statutory authority, the Secretary could not recover such funds. State of New Jersey, Department of Education v. Hufstedler, 662 F.2d 208, 218 (3rd Cir. 1981). Two days later the Fourth Circuit reached the opposite conclusion

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* The Act was amended by The Strengthening and Improvement of Elementary and Second Schools Act of 1978, Pub. L. 95-651, and is codified at 20 U.S.C. § 2701 et seq.

(App. A. pp. 5a-6a). West Virginia encourages this Court to settle the resulting conflict.

SUMMARY OF ARGUMENT

The purposes of Title I of the Elementary and Secondary Education Act of 1965 are not well served by the Agency's actions in seeking such refunds. West Virginia expended its disputed funds in a manner well calculated to address, in good faith, the needs of the children served by the program.

The State of West Virginia spent these funds without knowledge that they could be recovered. The evidence of West Virginia's "misapplication" of the $125,000.00 showed no bad faith expenditures, but rather a highly technical misapprehension of the Agency's administrative regulations. The State was not precognizant. It could not anticipate the later decisions of the Secretary,

the Education Appeal Board, and the Fourth Circuit Court of Appeals. The statutes under which it received the funds gave no notice that such funds would have to be reimbursed. Thus, West Virginia's choice to expend the funds was not exercised knowingly. It is unfair to penalize the students who are the present beneficiaries of free schooling because of past expenditures which were justifiably considered valid and unreimbursable under then existing law. Similar considerations apply to the disputed expenditures of Pennsylvania and New Jersey.

ARGUMENT

The State of West Virginia presently relies heavily on the Federal funds distributed to it under the Title I program and uses those funds to support remedial basic skills programs for disadvantaged children. (App. C.) Were it not for these funds, those school districts in West Virginia with a

low property tax base would be unable to provide specialized remedial programs to the relatively high percentage of disadvantaged children that live in such districts.

The Title I program has been particularly successful in West Virginia. Since 1978, West Virginia has measured the basic skills of children receiving Title I instruction. These measurements prove that these children improve their skills at a rate significantly greater than the general population of students. (App. D.)

Fayette County, the West Virginia school district which "misapplied" $125,000.00, is a property-poor district with a high percentage of disadvantaged children. Thus, while Statewide Title I funds constitute only four percent of the total expenditures by the State's school districts, they constitute seven percent of Fayette County's budget.

In 1975, pursuant to its responsibility for innovative program development, Fayette County requested the State Department of Education to approve the expenditure of $125,000.00 of Title I funds to build that portion of an administrative office building devoted to Title I personnel. The State, pursuant to its responsibility to insure that all proposals conform to current Title I guidelines, approved the expenditure. (Management of Title I funds is left to state and local authority, subject to audits by the Agency. A detailed history of these facts is contained in Appendix B, the decision of the Education Appeal Board, at 1b to 4b.) Both Fayette County and the State of West Virginia assumed that the expenditure was authorized by 20 U.S.C. § 241e(a)(1) (1974), which allows expenditures for the construction of "necessary school facilities."

The Agency disagreed, interpreting "school facilities" to mean "classrooms

and related facilities," not administrative offices. (App. B pp. 5b-9b.) Fayette County and West Virginia had no reason to anticipate that "related facilities" would take on such a narrow meaning, and only by equivocal legal reasoning did the Appeal Board reach such a definition.

But these fine distinctions take on no overwhelming importance unless the misapplied funds must be reimbursed after they have been expended. There was nothing in the statutes defining the Agency's authority that granted it the power to compel such reimbursements.

The purpose of the ambitious Title I program was to use the spending power of Congress to provide resources calculated to counteract "direct link between economic privation and educational underachievement." State of New Jersey, Deparment of Education v. Hufstedler, supra, at 210.

Since the funds are allocated on the basis of the level of economically deprived children within a state, school district, and school, those districts with a relatively higher percentage of deprived students receive relatively greater funds. The unfortunate result is that it is these districts which, owing to the complexity and logistics of a large scale Title I program, are most likely to inadvertently misapply funds. Additionally, such school districts, being funded in part by a relatively smaller tax base than wealthy districts, have fewer resources for "double-checking" their proposals against the "fine print" of administrative regulations and vague statutes.

Congress, of course, may attach conditions to the use of "shared" revenue, and sanctions or internal controls can achieve the goal of enforcing the conditions. But where Congress has not seen fit to demand reimbursements of misspent funds, or to

authorize the Agency to demand reimbursement, it is unjustifiable to assume that such authority exists "by common law" or otherwise. Pennhurst State School v. Halderman, 451 U.S. 1, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981).

Just as a criminal sanction defines the culpability of a behavior, or as a liquidated damages clause defines the economic consequences of a breach of contract, the consequences to a school district attached to a particular manner of spending defines the conditions of a spending power grant.

It has never been suggested that West Virginia's use of the disputed $125,000.00 undermined the purposes of Title I, and no one has suggested that its use was in bad faith. West Virginia's error was void of moral turpitude. The Agency has no "equitable" claim to the funds. There was no unjust enrichment to dignify the Agency's collection efforts.

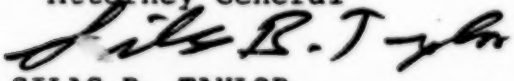
West Virginia believes that the largest portion of disputed Title I misexpenditures nationwide is equally non-culpable. Perhaps Congress' failure to provide the Agency with collection power recognized the counter-productiveness of reimbursements. But whether such was Congress' intent is unimportant. Had it intended to utilize such a sanction, it would have been addressed in the statutory scheme. The Third Circuit correctly resisted the temptation to engraft on the Agency a power it did not possess by statute. Being a creature of statute, and neither a creature of common law nor equity, its powers are limited by the statutes it serves.

CONCLUSION

For the reasons stated, the Petition should be granted and the Third Circuit affirmed.

Respectfully submitted,

CHAUNCEY H. BROWNING
Attorney General



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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1704

The State of West Virginia, Petitioner,

v.

Secretary of Education, The United States Department of Education, Respondent.

Petition for Review of an Order of the United States Department of Education.

Submitted: April 8, 1981
Decided: October 15, 1981

Before BRYAN, Senior Circuit Judge, PHILLIPS and SPROUSE, Circuit Judges.

(Ann V. Dornblazer, Assistant Attorney General on brief) for Petitioner; (Kay Rigling Gill, Stephen H. Freid, Office of General Counsel, U. S. Dept. of Education on brief) for Respondent.

UNPUBLISHED TO PUBLISHED

PER CURIAM:

The State of West Virginia petitions for review of an order of the Secretary of Education requiring it to refund $125,000 previously received under Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. § 241a et seq. (The Act).[1] Since we find that the Secretary utilized permissible procedures and acted on a substantial factual basis, we affirm.

The Act is administered by the United States Department of Education through state and local educational agencies. In 1975, the Fayette County (West Virginia) Board of Education, the local agency involved, requested that the West Virginia State Board of

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[1] The Act was amended by The Strengthening and Improvement of Elementary and Secondary Schools Act of 1978, Pub. L. 95-651, and is codified at 20 U.S.C. § 2701 et seq..

Education, the state agency, approve an amended plan permitting the local agency to spend $125,000 of Title I funds to meet part of the building cost for a county school board administrative office complex. The $125,000 was allocated to that portion of the building complex to be occupied by Title I personnel. The state board approved the expenditure of funds and the building was constructed. Subsequently, the Health, Education and Welfare Audit Agency conducted an audit of the local agency's Title I program and in 1977 recommended, among other things, that the local agency be required to refund the $125,000 to the United States as having been misspent. This recommendation was accepted by the United States Department of Education, and the West Virginia Department of Education appealed to the predecessor of the Education Appeal Board. After the appeal was transferred to it for disposition, the Education Appeal Board (the Board) conducted a pre-hearing conference and received briefs and related

material. It concluded that the funds were not spent for "school facilities" and that the construction was not essential to the success of the Title I program, as required by the Act. The Secretary of Education adopted the findings and rulings of the Board.

West Virginia contends that the Board lacked statutory authority to order the refund, that it was denied an evidentiary hearing before the Board, and that the Board erroneously concluded that the funds were misspent in violation of the Act.

There is no merit to West Virginia's contention that the Board was without statutory authority to hear the appeal. It was established in 1978 pursuant to 20 U.S.C. § 1234, and interim final regulations were published in the Federal Register in May, 1979, 44 Fed. Reg. 30528-34 (1979), clearly stating that pending appeals were transferred to the Board from its predecessor and specifically listed the

appeal sub judice as one of the appeals to be determined by the Board. 44 Fed. Reg. 43807 (1979). We perceive no infirmity in that procedure nor from the fact that Congress later attempted to disapprove the final regulations subsequently issued by the Board.

It is also clear that the Board has the authority to order the refund. Section 185(b) of the Act, 20 U.S.C. § 2835(b), grants the Secretary specific authority to require the repayment of funds determined to have been misspent. The Secretary ordered West Virginia to repay the funds in June, 1977; the hearing, although requested in 1977, was not held until 1979 and the decision was reached in 1980. Section 185(b) was enacted in 1978. There is no legislative indication that the authority to order repayment is to be effective only prospectively, and the statute's remedial purposes will be more fully served by applying it retroactively. Even if this were not so, the Secretary can, independently of specific statutory

authority, recover funds which are granted for specific purposes and misspent in contradiction of those purposes. See Mt. Sinai Hospital of Greater Miami, Inc. v. Weinberger, 517 F.2d 329, 337 (5th Cir. 1975) cert. denied, 425 U.S. 935 (1976).

Likewise, there is no merit in West Virginia's contention that it was impermissibly denied an evidentiary hearing before the Board. The Board conducted a "pre-hearing" conference, and it was not clear from West Virginia's position there or subsequently that it desired an evidentiary hearing. On appeal, West Virginia advances several general reasons underlying its argument that the building's construction was essential to the purposes of the Act, but the basic facts are undisputed, and the record before the Board, consisting of briefs and exhibits, furnished it with a sufficient factual background on which to apply the Act's provisions.

West Virginia contends substantively that it was entitled to spend the $125,000 on the construction of an administrative office complex. The Board ruled to the contrary, finding that the building was not a "school facility" as defined by the Act. 20 U.S.C. § 244(13).

Section 141(a)(1) of the Act provided in pertinent part that Title I funds could only be used for:

> the excess cost of programs and projects (including the acquisition of equipment, payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools eligible for assistance under this title, the training of teachers, and, where necessary, the construction of school facilities and plans made or to be made for such programs, projects, and facilities) (A) which are designed to meet the special educational needs of

> educationally deprived children in school attendance areas having high concentrations of children from low-income families. . .

20 U.S.C. § 241(a)(1). Section 403(13) of the Act provided that:

> The term school facilities means classrooms and related facilities (including initial equipment) for free public education and interests in land (including site, grading and improvements) on which such facilities are constructed, except such term does not include those gymnasiums and similar facilities intended primarily for exhibitions for which admission is to be charged to the general public.

20 U.S.C. § 244(13).

The same definition of school facilities was contained in section 116.1(w) of the Act's regulations then in effect. 45 C.F.R. § 116.1(w) (1974).

The Secretary interprets the phrase "classrooms and related facilities" to mean space utilized to supplement services and activities for children, that it does not include administrative offices, and contends that even classroom facilities were not allowed to be constructed with Title I funds "unless such construction is demonstrated as being essential in order to assure the success of a program or project under Title I of the Act," citing 45 C.F.R. § 116.17(i) (1974). West Virginia, on the other hand, urges that the administrative office space was a "related facility" essential for Fayette County's Title I project. The resolution of these contentions involves a narrow interpretation of the applicable statutes and regulations. Neither legislative history nor other decisions of the Secretary provide any clues as to what that interpretation should be. In such circumstances courts, of course, give deference to an agency's interpretation of a statute governing it and its own regulations. See United States v.

Larionoff, 431 U.S. 864, 872 (1977); Commonwealth of Virginia ex rel. Coleman v. Califano, 631 F.2d 324, 327 (4th Cir. 1980). Seeing no reason why that principle should not be followed in this instance, and concluding that the Secretary had a substantial factual basis for finding that the local agency misspent the involved funds for construction of the administrative office com- plex, the order of the Secretary is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-1704

FILED
Dec 23 1981
William K. Slate,II
Clerk

The State of West Virginia,

Petitioner,

versus

Secretary of Education, etc.,

Respondent.

O R D E R

Upon consideration of the petitioner's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED and GRANTING

respondent's motion to publish the opinion.

Entered at the direction of Judge Sprouse for a panel consisting of Judge Bryan, Judge Phillips, and Judge Sprouse.

For the Court,

/s/ William K. Slate, II
CLERK

APPENDIX B

EDUCATION APPEAL BOARD
U.S. DEPARTMENT OF EDUCATION

Appeal of:	)	
	)	Docket Number
	)	3-(33)-77
The State of	)	Audit Control No.
	)	03-70002
West Virginia	)	
	)	

PANEL'S DECISION

I. Preliminary Statement

The West Virginia Department of Education (SEA) on July 13, 1977, filed a timely Application for Review appealing from a final audit determination dated June 14, 1977, made by the Deputy Commissioner for Elementary and Secondary Education (Deputy Commissioner) of the U.S. Office of Education (OE). The audit determination covered activities conducted under Title I of the Elementary and Secondary Education Act of 1965, as amended (Title I), in Fayette County, West Virginia, from July 1, 1973, through June 30, 1976, and requested the SEA to refund $125,000.

A three-member Panel was appointed to hear the appeal. A prehearing conference was held on November 19, 1979. The SEA and the Deputy Commissioner participated and later filed briefs and other materials. Neither of the parties requested an evidentiary hearing. The Panel concluded after consideration of the prehearing conference record and the written submissions that only legal issues were involved and that an evidentiary hearing was not necessary.

II. Facts

In April 1975, the Fayette County Schools (LEA) proposed an amendment to its Title I project application requesting the SEA's approval for the use of Title I funds for partial payment of continuation of costs for a new administrative office building. On September 10, 1975, the SEA determined that Title I personnel would require 29 percent of the LEA office complex and thereupon approved the use of Title I funds to pay

for 29 percent or $125,000, whichever was less, of the total cost of constructing the office complex. Thereupon the LEA spent $125,000 in Title I funds on such construction. Subsequently, the HEW Audit Agency performed an audit of the Title I programs of the LEA and concluded that the $125,000 of Title I funds had been improperly used.

On July 13, 1977, the SEA appealed from the final determination of the Deputy Commissioner approving the audit finding, and requested a hearing. By letter dated August 15, 1977, the Chairman of the Audit Hearing Board granted the request. After appointment of the Hearing Panel, a prehearing conference was held on November 19, 1979, at which it was determined that there was no dispute regarding the facts and that the following legal issues must be decided:

(1) Does the term "school facilities" as used in Section 141(a)(1) of the Title I statute

(20 U.S.C.§241e(a)(1)(1974)) and as used in Section 116.1(w) of the Title I Regulations (45 C.F.R. §116.1(w) (1974)) allow the use of Title I funds to pay for construction of administrative offices which house Title I personnel?

(2) Were the administrative offices, constructed to house Title I personnel, essential to the success of the Title I program in Fayette County?

III. Opinion

I. The Panel holds that Title I funds cannot be used to help pay construction costs of an administrative office building.

Relevant language of Section 141(a)(1) of the Title I statute (20 U.S.C. §241e(a)(1)(1974)) authorizes the expenditure of Title I funds only for:

> ...programs and projects (including the acquisition of equipment, payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools eligible for assistance under this section, and, where necessary, the construction of school facilities and plans made or to be made for such programs, projects, and facilities) (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families.... (Emphasis supplied).

The term "school facilities" is defined in Section 403(13) of the Elementary and Secondary Education Act (20 U.S.C. §244(13)(1974)) as follows:

> The term "school facilities" means classrooms and related facilities (including initial equipment) for free public education and

> interests in land (including site, grading, and improvements) on which such facilities are constructed, except that such term does not include those gymnasiums and similar facilities intended primarily for exhibitions for which admission is to be charged to the general public.

The public statutory definition of "school facilities" is repeated almost verbatim in Section 116.1(w) of the Title I regulations (45 C.F.R. §116.1(w)(1974)).

The definition limits "school facilities" to "classrooms and related facilities," i.e. facilities used directly for instruction purposes. An administrative office is not such a purpose.

Excepted from the general approval of "school facilities" are "those gymnasiums and similar facilities intended primarily for exhibitions for

which admission is to be charged to the general public." Counsel for the SEA has argued that, under the principle of statutory construction that "the expression of one thing is the exclusion of another" (expressio unius est exclusio alterius), the express exclusion of "gymnasiums and similar facilities" would allow the inclusion of administrative facilities.

The argument is phrased "...the Congress specifically excluded gymnasiums and similar facilities and, therefore, one must assume that all other support facilities essential to the success of the Title I programs are included within the meaning of school facilities." (SEA Brief p.5). "Gymnasiums and similar facilities" are, however, "school facilities" included within the basic definition of "school facilities" and therefore require an express exception in order to be excluded. In contrast, administrative offices are not included within the basic definition. Therefore the offered

principle of statutory construction does not apply.

The SEA also argues that the definition of "school facilities" found in Section X 35 10 of the Standard Terminology for Curriculum and Instruction in Local and State Schools Systems published in 1970 by the National Center for Education Statistics under the direction of the Commissioner of Education defines "school facilities" to include "services supporting construction." (SEA Brief pp. 5-6). However, a definition in the Standard Terminology cannot override an express statutory definition.

The SEA also argues that, in a Michigan audit, "the Office of Education held that Title I funds could properly be used for the acquisition and remodeling of administrative offices to house Title I personnel." (SEA Brief, pp. 6-7). The record now available on the Michigan case is not clear in regard to funding of administrative offices.

In any event, it would still be necessary for the Panel to apply existing law and regulations.

Therefore, this Panel holds that Title I funds cannot be used to help pay construction costs of an administrative office building.

II. The Panel holds that administrative offices, constructed to house Title I personnel, were not essential to the success of the Title I program in Fayette County.

Section 141(a)(1) of the Title I statute (20 U.S.C. §241e(a)(1)(1974)) authorizes construction of school facilities only "where necessary."

Section 116.17(i) of the Title I regulations (45 C.F.R. §116.17(i)(1974)) requires that:

> "No application for a project grant under Title I of the Act may cover the construction of

> school facilities unless such construction is demonstrated as being essential in order to assure the success of a program or project under Title I of the Act...."

It must be noted that the authorization of construction of essential school facilities is limited to "school facilities" and that this Panel is holding that administrative offices are not "school facilities." Even if administrative offices, however, were to be treated as "school facilities," construction of these administrative offices was not essential to the success of the Title I program.

The SEA describes the conditions that required construction of administrative facilities as "not optimal." (SEA Brief p. 8). The statement is consistent with statements in the SEA's Application for Review regarding "overcrowded conditions," "isolating the Title I program staff," and "reduced efficiency." Assuming these statements

to be accurate, they do not support a finding that the construction of administrative facilities was essential.

Similarly, the SEA argues that Title I gives primary responsibility to local officials for designing and implementing Title I programs. (SEA Brief p.9). Granting that such an observation is accurate, it is still necessary for local officials to act within the law.

The SEA also argues that present use of the constructed facilities includes Title I parent use of conference rooms and use by Title I classes of "materials and equipment available in the resource center area." (SEA Brief p. 10) Such uses, particularly that by Title I classes of materials and equipment, might well have been important in justifying the new facility as "essential" if they had been contemplated and described at the time of the original application. The SEA states, however, that: "These additional uses

by both Title I parents and children were not considered in the Title I personnel space occupancy which justified used(sic) of the Title I funds." (SEA Brief p. 10). The present use of the building comes too late to justify its construction.

Therefore the SEA must refund $125,000 to the U.S. Department of Education.

Pursuant to Subpart F Section 100d.81 of the Regulations of the Department of Education prescribed for the Education Appeal Board (45 Fed. Reg. 22634 (April 3, 1980)), the Board Chairperson will submit the Panel's decision to the Secretary of Education. Each party has the opportunity to file comments and recommendations on the Panel's decision with the Board Chairperson within 15 calendar days of the date the party receives the Panel's decision. The Panel's decision becomes the final decision of the Secretary 60 calendar days after the date the SEA

receives the Panel's decision, unless the Secretary, for good cause shown, modifies or sets aside the Panel's decision.

EDUCATION APPEAL BOARD

/s/Harry Hogan
Harry Hogan, Chairman
Cora Beebe
Aloysius McCabe

Date: June 20, 1980

APPENDIX C

Summary of

ESEA TITLE I

in West Virginia

Program Elements and Approved Expenditures,
Regular Term Fiscal Year 1981

Bureau of Services and Federal Assistance

Roy Truby
State Superintendent of Schools
Charleston, West Virginia
1981

Figure 1 graphically illustrates the relative proportion of the total amount of Title I funds budgeted and approved state-wide in West Virginia for each of the major budgetary categories contained in Table 3 for Fiscal Year 1981.

FIGURE 1

GRAPHIC ILLUSTRATION OF ESEA TITLE I APPROVED EXPENDITURES FOR LOCAL INSTRUCTIONAL PROGRAMS IN WEST VIRGINIA BY MAJOR BUDGET CATEGORY FOR FISCAL YEAR 1981

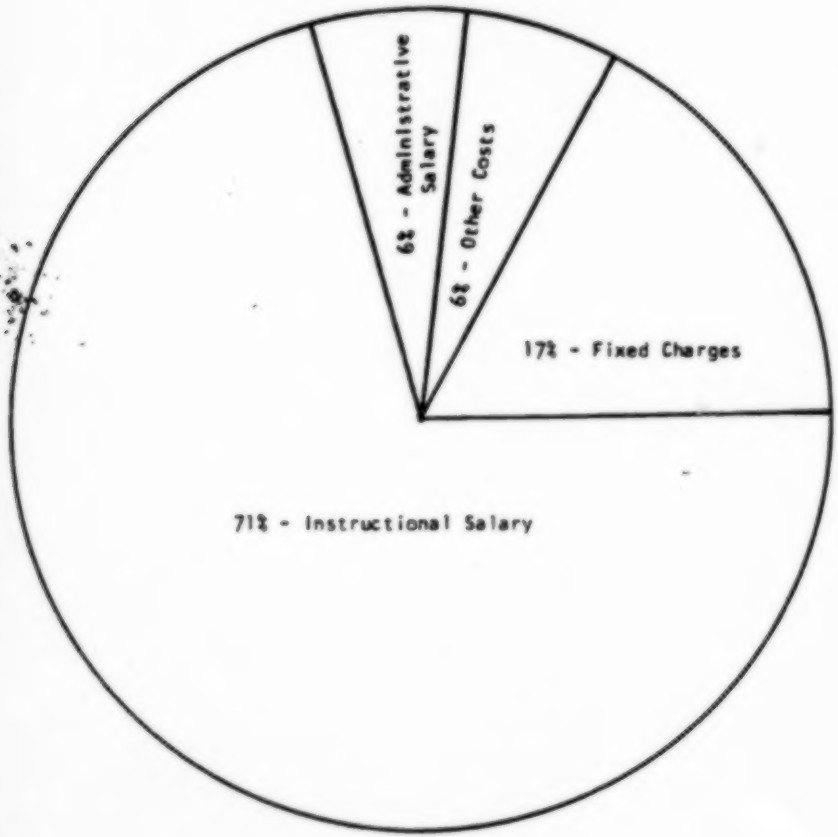

FIGURE 2

GRAPHIC ILLUSTRATION OF THE NUMBER OF LEAS PROVIDING ESEA TITLE I READING INSTRUCTIONAL PROGRAMS IN WEST VIRGINIA BY GRADE LEVEL FOR FISCAL YEAR 1981

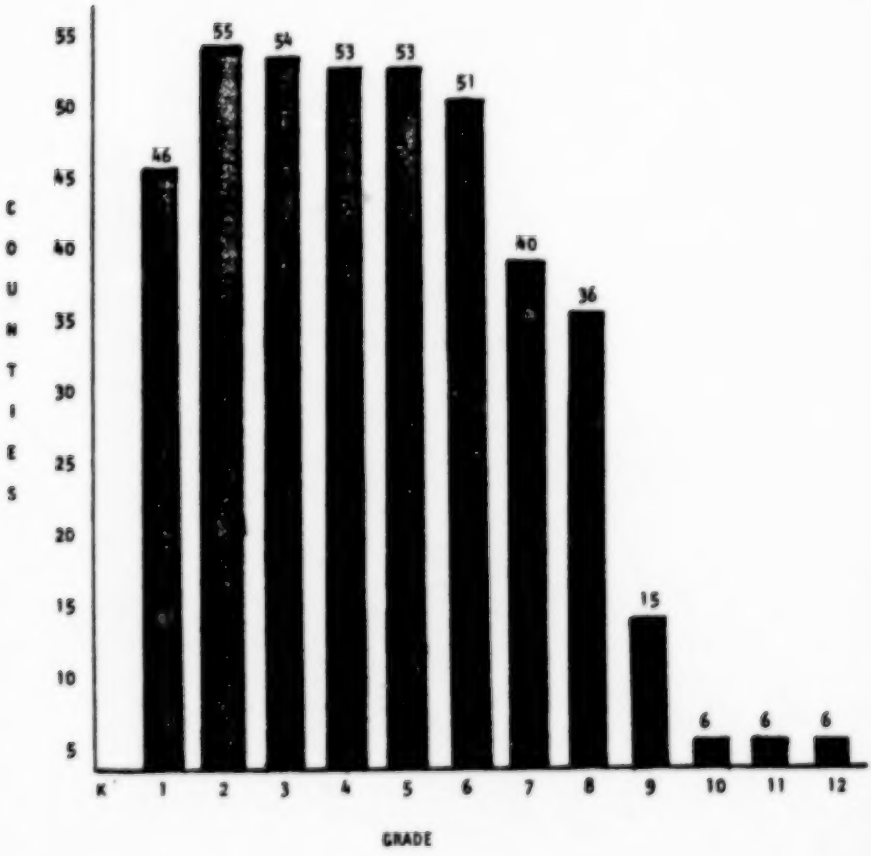

FIGURE 3

GRAPHIC ILLUSTRATION OF THE NUMBER OF LEAS PROVIDING TITLE I MATHEMATICS INSTRUCTION IN WEST VIRGINIA BY GRADE LEVEL FOR FISCAL YEAR 1981

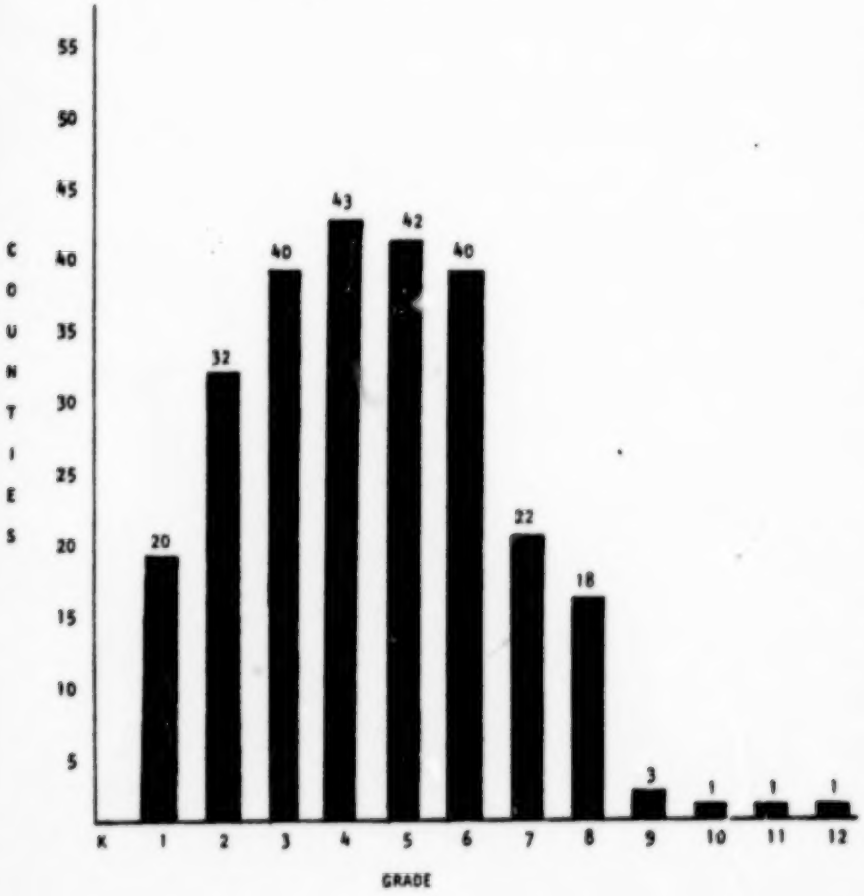

TABLE 6

DESCRIPTION OF THE NUMBER OF PUBLIC SCHOOLS SERVED
BY ESEA TITLE I INSTRUCTIONAL PROGRAMS IN WEST VIRGINIA
BY COUNTY, BY SCHOOL CLASSIFICATION FOR FISCAL YEAR 1981

1	2	3	4	5	6
County	School Classification				
	Elem.	Middle	Junior	Senior	Total
Barbour	4	2			6
Berkeley	14				14
Boone	9		1		10
Braxton	6	3			9
Brooke	4	2		1	7
Cabell	24		5		29
Calhoun	4			1	5
Clay	7		1		8
Doddridge	10				10
Fayette	26	7			33
Gilmer	5				5
Grant	3		1	1	5
Greenbrier	10		9		19
Hampshire	8		2		10
Hancock	8				8
Hardy	3	2		1	6
Harrison	24				24
Jackson	6	2			8
Jefferson	5				5
Kanawha	47				47
Lewis	10		2		12
Lincoln	13		1		14
Logan	22		2		24
Marion	11		2		13
Marshall	8				8
Mason	11		1		12
McDowell	11	1	2	4	18
Mercer	15		1	5	21
Mineral	6	2	1	1	10
Mingo	22		1		23
Monongalia	24		1	1	26
Monroe	4		2		6
Morgan	4	1	1	1	7
Nicholas	18				18
Ohio	5		2	1	8
Pendleton	5	4	1	1	11
Pleasants	1	1			2
Pocahontas	3	3		1	7
Preston	12				12
Putnam	13	3			16
Raleigh	27				27
Randolph	10		4	4	18

TABLE 6 (CONTINUED)

DESCRIPTION OF THE NUMBER OF PUBLIC SCHOOLS SERVED
BY ESEA TITLE I INSTRUCTIONAL PROGRAMS IN WEST VIRGINIA
BY COUNTY, BY SCHOOL CLASSIFICATION FOR FISCAL YEAR 1981

1	2	3	4	5	6
County	School Classification				
	Elem.	Middle	Junior	Senior	Total
Ritchie	6				6
Roane	7		1		8
Summers	6			1	7
Taylor	2		1	1	4
Tucker	4				4
Tyler	2	2			4
Upshur	9	1			10
Wayne	13	2			15
Webster	4				4
Wetzel	5				5
Wirt	1			1	2
Wood	8		5		13
Wyoming	11	2			13
TOTALS	560	38	47	31	676

TABLE 9

DESCRIPTION OF APPROVED ESEA TITLE I EXPENDITURES IN WEST VIRGINIA FOR INSTRUCTION, BY COUNTY, BY PROGRAM ELEMENT, FOR FISCAL YEAR 1981

1	2	3	4	5
COUNTY	INSTRUCTIONAL PROGRAM ELEMENT			TOTAL INSTRUCTION
	READING	MATHEMATICS	OTHER	
Barbour	198,580	67,470		266,050
Berkeley	267,177	162,690		429,867
Boone	283,800	121,145		404,945
Braxton	224,293	189,255		413,548
Brooke	191,182			191,182
Cabell	553,651	246,780		800,431
Calhoun	66,693	51,191		117,884
Clay	204,966	36,287		241,253
Doddridge	106,298			106,298
Fayette	968,286		141,770	1,110,056
Gilmer	74,410	21,960		96,370
Grant	147,739	27,246		174,985
Greenbrier	541,085	167,464		708,549
Hampshire	130,368	84,433		214,801
Hancock	203,029			203,029
Hardy	129,575			129,575
Harrison	580,389	77,346		657,735
Jackson	128,540	74,593		203,133
Jefferson	121,467	82,260		203,727
Kanawha	1,798,501	576,667	385,273	2,760,441
Lewis	273,493	21,832		295,325
Lincoln	286,346	274,991		561,337
Logan	677,051	386,694		1,063,745
Marion	321,509	158,510		480,019
Marshall	230,312	58,713		289,025
Mason	206,216	171,944		378,160
McDowell	1,257,090	187,363	221,373	1,665,826
Mercer	811,296	203,268		1,014,564
Mineral	275,135	28,785		303,920
Mingo	361,288	198,328		559,616
Monongalia	314,589	115,384		429,973
Monroe	252,573			252,573
Morgan	112,116			112,116
Nicholas	365,030			365,030
Ohio	380,126	44,070		424,196
Pendleton	81,225	38,769		119,994
Pleasants	55,998	27,763		83,761
Pocahontas	141,719	78,298		220,017
Preston	592,021			592,021
Putnam	181,950	31,620		213,570
Raleigh	592,971	592,803		1,185,774

TABLE 9 (CONTINUED)

DESCRIPTION OF APPROVED ESEA TITLE I EXPENDITURES IN WEST VIRGINIA FOR INSTRUCTION, BY COUNTY, BY PROGRAM ELEMENT, FOR FISCAL YEAR 1981

1	2	3	4	5
COUNTY	INSTRUCTIONAL PROGRAM ELEMENT			TOTAL INSTRUCTION
	READING	MATHEMATICS	OTHER	
Randolph	234,357	188,327		422,684
Ritchie	147,578	23,103		170,681
Roane	220,588	24,174		244,762
Summers	426,152	14,150		440,302
Taylor	110,713		52,327	163,040
Tucker	103,308			103,308
Tyler	116,770			116,770
Upshur	251,052			251,052
Wayne	405,713	366,621		772,334
Webster	215,241	59,355		274,596
Wetzel	151,982	71,054	44,990	268,026
Wirt	62,202	46,534		108,736
Wood	393,442	119,428		512,870
Wyoming	356,137	356,137		712,274
TOTALS	$17,885,318	$5,874,805	$845,733	$24,605,856

TABLE 7

DESCRIPTION OF THE NUMBER OF PUBLIC SCHOOL STUDENTS
PARTICIPATING IN ESEA TITLE I INSTRUCTIONAL PROGRAMS
IN WEST VIRGINIA BY COUNTY, BY PROGRAM ELEMENT FOR FISCAL YEAR 1981

1	2	3	4	5
	STUDENTS PARTICIPATING			
	Duplicated Count			Unduplicated Count
County	Reading	Math	Other	
Barbour	388	108		427
Berkeley	905	573		1,448
Boone	718	540		941
Braxton	500	500		830
Brooke	380			380
Cabell	1,142	433		1,531
Calhoun	225	137		245
Clay	480	118		538
Doddridge	180			180
Fayette	1,902		94	1,996
Gilmer	170	75		220
Grant	275	48		295
Greenbrier	1,200	292		1,359
Hampshire	450	270		615
Hancock	360			360
Hardy	1,200	292		1,359
Harrison	1,380	285		1,530
Jackson	323	300		623
Jefferson	208	138		346
Kanawha	3,060	1,049	374	4,089
Lewis	564	65		594
Lincoln	760	875		875
Logan	1,116	1,054		1,074
Marion	451	137		518
Marshall	436	293		504
Mason	298	194		343
McDowell	2,700	285	375	2,760
Mercer	1,480	908		1,858
Mineral	425	60		500
Mingo	631	631		449
Monongalia	629	220		868
Monroe	328			328
Morgan	215			215
Nicholas	802			802
Ohio	623	182		646
Pendleton	144	169		240
Pleasants	104	142		220
Pocahontas	197	215		412
Preston	1,081			1,081
Putnam	720	188		861
Raleigh	1,931	1,779		2,149

TABLE 7 (CONTINUED)

DESCRIPTION OF THE NUMBER OF PUBLIC SCHOOL STUDENTS
PARTICIPATING IN ESEA TITLE I INSTRUCTIONAL PROGRAMS
IN WEST VIRGINIA BY COUNTY, BY PROGRAM ELEMENT FOR FISCAL YEAR 1981

1	2	3	4	5
	Duplicated Count			Unduplicated Count
County	Reading	Math	Other	
Randolph	549	458		744
Ritchie	292	60		314
Roane	503	56		559
Summers	634	35		680
Taylor	266		60	326
Tucker	202			202
Tyler	240			240
Upshur	460			460
Wayne	1,103			1,084
Webster	330			570
Wetzel	307	147	87	476
Wirt	137			230
Wood	780			940
Wyoming	579			1,139
TOTALS	36,863	13,311	990	44,573

TABLE I

DESCRIPTION OF THE ALLOCATION OF ESEA TITLE I FUNDS IN WEST VIRGINIA
FOR FISCAL YEARS 1966 THROUGH 1981, INCLUSIVE,
BY MAJOR ALLOCATION CATEGORY

1	2	3	4	5	6	7	8	9	10	11	12
FISCAL YEAR	PART A BASIC GRANT	PART B	PART C	HANDI-CAPPED	MIGRANT	NEGLECT-ED	DELINQUENT	ADULT CORRECT.	ADMINIS-TRATION	CONCEN-TRATION	TOTAL
1966	$ 16,991,225	$	$	$ 88,715	$	$	$	$	$ 170,799	$	$ 17,250,739
1967	14,658,391			83,449	17,194				147,756		14,923,368
1968	17,193,348			158,566	33,513				174,644		17,632,256
1969	15,569,731			167,756	5,226	13,312	61,479		143,680		15,961,095
1970	18,974,601			272,858	52,909	15,015	59,931		195,177		19,605,491
1971	20,524,496	60,538	290,778	281,387	94,000	20,539	155,756		213,921		21,641,415
1972	20,524,496	69,084	409,497	379,645	128,817	23,009	187,905		216,902		21,939,355
1973	*20,586,407		977,766	449,717	192,397	25,796	210,671		224,007		22,622,761
1974	**17,349,914	65,907	648,463	470,963	189,259	25,470	238,491		189,426		19,177,893
1975	16,348,525		183,227	470,963	204,992	25,470	238,491	30,101	175,061		17,676,830
1976	16,577,023			546,235	205,652	25,470	238,491	32,489	176,290		17,801,650
1977	17,686,814			546,235	205,639	25,470	238,491	53,011	187,592		18,943,253
1978	20,256,937			546,235	206,301	25,470	238,491	53,011	213,295		21,539,740
1979	25,261,940			546,235	205,457	25,470	238,491	63,546	263,450		26,604,589
1980	27,612,266			507,631	205,921	21,650	202,717	59,014	443,242	961,906	29,989,347
1981	27,929,965			549,674	205,921	18,402	172,309	81,763	443,914	636,308	30,038,236
TOTALS	$314,046,059	$195,529	$2,465,731	$6,066,274	$2,153,198	$379,207	$2,516,714	$367,935	$3,579,157	$1,578,214	$333,348,018

*Includes $61,911 reallocation of adult correctional funds to Part A funds.
**Includes $30,101 reallocation of adult correctional funds to Part A funds.

APPENDIX D

NCEs are an equal interval score that identifies the relative position of students on some testing instrument. NCE scores range from 1-99. A child's NCE score, under ordinary circumstances, would be consistent from year to year. In other words, a student scoring at the 40th NCE on an achievement test in the third grade would be expected to score at the 40th NCE when he reached the 6th grade. They were developed in a manner that makes them an equal interval scale which allows them to be averaged without distortion. Any change in a student's NCE score over a period of time should be the result of some intervention, such as a Title I program.

MEAN GAIN SCORES* BY YEAR, BY SUBJECT AND BY GRADE
FOR WEST VIRGINIA'S STUDENTS RECEIVING ESEA TITLE I INSTRUCTION

GRADE	1977-78		1978-79		1979-80		1980-81		GRA
	MATH	READ	MATH	READ	MATH	READ	MATH	READ	
2	10.5	7.6	4.6	7.2	5.3	4.5	3.2	2.7	2
3	7.5	4.1	6.3	4.7	3.9	3.0	2.9	2.3	3
4	10.5	5.6	8.6	4.5	7.0	4.7	5.5	4.0	4
5	8.3	5.8	5.6	3.0	2.8	3.9	2.8	2.7	5
6	3.8	4.8	5.3	3.4	5.7	3.6	4.5	3.4	6
7-12	10.9	6.4	6.9	4.3	5.1	4.7	4.4	4.1	7-12
2-12	7.8	5.7	6.4	4.7	5.1	4.1	4.0	3.2	2-12

*Mean gain scores are stated in NCEs (Normal Curve Equivalents).

CERTIFICATE OF SERVICE

I, Silas B. Taylor, Assistant Attorney General of the State of West Virginia, do hereby certify that three (3) true copies of the foregoing Brief of the State of West Virginia as Amici Curiae In Support of the Respondents were served by placing said copies in the United States mail with first-class postage prepaid on the 16th day of June, 1982, addressed as follows:

Philip H. Rosenfelt, Esquire
Robert J. Arnot, Esquire
United States Commissioner of Education
Department of Health, Education and Welfare
Room 4091, F.O.B. #6
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Three (3) copies were additionally served on the Solicitor General of the United States by depositing said copies

in the United States mail with first-class postage prepaid on the 16th day of June, 1982, addressed as follows:

The Honorable Rex E. Lee
Solicitor General
United States Department of
Justice
Washington, D.C. 20530

Silas B. Taylor
SILAS B. TAYLOR

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